No. 10,455

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN VEGETABLE OILS COMPANY, INCORPORATED (a corporation),

Appellant,

vs.

SOUTHERN COTTON OIL COMPANY (a corporation), SOUTHERN PACIFIC COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEE, SOUTHERN COTTON OIL COMPANY.

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BRIEF FOR APPELLEE, SOUTHERN COTTON OIL COMPANY.

STATEMENT OF THE CASE.

Appellee Southern Cotton Oil Company, plaintiff below, brought this action against appellant Western Vegetable Oils Company and appellee Southern Pacific Company, to recover the value of a tank car of coconut oil (Complaint, R. 2-7). Southern Cotton Oil Company had purchased the oil from appellee Western Vegetable Oils Company pursuant to a written contract of sale (R. 20).

Appellant Western Vegetable Oils Company loaded the coconut oil into a tank car and delivered it to appellee Southern Pacific Company at Oakland, California, for

transportation by rail to Gretna, Louisiana (Complaint, paragraphs VII and VIII, R. 4-5). The oil was admittedly lost in transit and was never delivered to the buyer, appellee Southern Cotton Oil Company (Complaint, paragraph IX, R. 5).

The complaint alleges that the loss of the oil was due to the negligence of appellant Western Vegetable Oils Company, or to the negligence of Southern Pacific Company, or to the negligence of both of these companies, defendants below (Complaint, paragraph XI, R. 6). The answer of each defendant to the complaint, in effect, charges the other defendant with responsibility for the loss of the oil (R. 7-20). It is obvious that one or both of the defendants is responsible for the loss of the oil, for neither defendant pleads that the loss was due to the fault of appellee-plaintiff, or to an act of God or other excepted cause for which the defendants might not in any event be liable. The action, therefore, presents a three-cornered controversy which requires the presence of the three parties for a proper and final determination.

Appellant alleged in its answer to the complaint that the contract for the sale of the oil provided, by reference to rules not set out in the contract, for arbitration of disputes and prayed for a stay of the action against appellant pending arbitration (R. 15-17).

After filing its answer to the complaint, appellant filed a motion to stay the action as to itself, based on the provisions of Sections 1280 to 1293 of the California Code of Civil Procedure, until an arbitration be had between appellant and appellee Southern Cotton Oil Company (R. 23-25).

The contract between appellant and appellee Southern Cotton Oil Company does not by its terms provide for arbitration (R. 20). Appellant contends that the contract incorporates by reference certain other rules which do contain a provision for arbitration (R. 24).

The motion for a stay of proceedings pending arbitration was presented to the District Court on the pleadings and on affidavits. The affidavits show that the loss of oil occurred during July, 1941; that appellee Southern Cotton Oil Company presented claim for the loss against appellant on January 19, 1942; that the complaint was filed on November 19, 1942; that appellant declined the claim for loss of the oil long prior to the date on which the complaint was filed; that, although appellant mentioned or suggested that arbitration might be advisable, no formal demand or request for arbitration was made by appellant until January 29, 1943, more than two months after complaint had been served on appellant (R. 85-88, 26-36; Court's finding, R. 91-92).

The District Court, after argument and consideration of briefs, denied appellant's motion to stay the action pending arbitration (R. 90-93). The Court's opinion states the following reasons for denial of the motion: (1) The contract does not incorporate the Institute rule providing for arbitration; (2) appellant did not, in any event, submit the dispute to arbitration "immediately", as required by the Institute rule; (3) the pending controversy between the parties is not included within the scope of the arbitration clause relied upon by appellant.

APPELLANT'S SPECIFICATIONS OF ERROR ARE INSUFFICIENT TO RAISE THE POINTS ARGUED.

Appellant sets forth two specifications of error (Brief, p. 6). The second specification of error is simply a statement that the Court below erred in denying appellant's motion to stay proceedings pending arbitration. Such statement is not a specification of a particular error, but a mere conclusion that the decision is wrong.

United States v. Shingle, 91 F. (2d) 85, 91 (9 C.C.A.);

American Surety Co. v. Fischer Warehouse Co., 88 F. (2d) 536, 539 (9 C.C.A.);

Humphreys Gold Corp. v. Lewis, 90 F. (2d) 896, 898 (9 C.C.A.).

Appellant's first specification of error is to the effect that the Court erred in holding that the controversy which is the subject matter of this action does not come within the alleged arbitration clause of the contract. This is a mere statement of a ground of decision. But, even if it be assumed that this is a specification of a particular alleged error on the part of the Court below, such alleged error would not entitle appellant to a reversal of the order from which the appeal is taken. The argument will show that there was no error on the part of the Court below in the respect alleged. However, the order of the Court below may also be sustained on the other grounds, which appellant discusses, but to which it specifies no error. Appellant has set forth no specification of any error which would require a reversal of the order in any event, nor

any specification of errors which, considered together, would require a reversal of the order.

Helvering v. Gowran, 302 U. S. 238, 245, 82 L. Ed. 224, 230;

Stoody Co. v. Mills Alloys, 67 F. (2d) 807, 809 (9 C.C.A.).

Appellant's specifications of error are, therefore, insufficient to raise the points discussed in its brief. The lack of proper specifications of error is emphasized by the fact that the various points of argument made by appellant are lumped under the general heading "Statement of the Argument" and are not designated by appropriate headings or summaries indicating the points presented.

SUMMARY OF ARGUMENT.

The order of the District Court denying the motion of appellant to stay proceedings pending arbitration is correct because:

I. The contract does not provide for arbitration, either expressly or by reference to the published Rules and Regulations of the National Institute of Oilseed Products.

II. Appellant is in default in proceeding with arbitration.

III. The issues involved in this action are not referable to arbitration under the alleged arbitration clause.

IV. The arbitration provided for by the Rules of the National Institute of Oilseed Products is common-law

arbitration and hence an agreement to arbitrate thereunder is revocable at any time prior to an award.

V. Appellant's motion for a stay of proceedings is based on the California Arbitration Laws which will not be enforced by the Federal Courts.

ARGUMENT.

I. THE CONTRACT DOES NOT PROVIDE FOR ARBITRATION EITHER EXPRESSLY OR BY REFERENCE TO THE PUBLISHED RULES AND REGULATIONS OF THE NATIONAL INSTITUTE OF OILSEED PRODUCTS.

The first question to be determined is whether the contract (R. 20) between appellant and appellee Southern Cotton Oil Company provides for arbitration at all. The contract, admittedly, does not within its four corners provide for or even *mention* arbitration. Appellant, nevertheless, contends that an arbitration clause is incorporated into the contract by the following reference therein to certain rules:

"This contract is subject to the published Rules & Regulations of the National Institute of Oilseed Products—and which are hereby made a part of this contract, except insofar as such Rules & Regulations are modified or abrogated by this contract."

Appellant has annexed to the affidavit of Adolph Schumann, a set of rules which it states are the rules thus referred to in the contract and which contain a provision for arbitration (R. 37-79). It will be observed at once that the contract refers to the "published Rules & Regulations of the National Institute of Oilseed Products", whereas

the rules by which appellant seeks to invoke arbitration are entitled "National Institute of Oilseed Products, San Francisco, California, U.S.A. Trading Rules effective February 1, 1940". The contract, then, does not even correctly or specifically refer to the rules which appellant now seeks to invoke.

In considering appellant's contention, it must be borne in mind that appellant does not merely seek to add a provision to the contract which is not therein set out, but seeks by incorporation of certain rules by reference to deprive appellee of its right to appeal to the Courts for redress and to substitute therefor the non-judicial award of unnamed arbitrators. The intent or agreement of a party to waive its right to seek the usual remedies afforded by the Courts must be established by clear, specific language, not by implication.

B. Fernandez & Hnos v. Rickert Rice Mills, Inc.,
119 F. (2d) 809, 815 (1 C.C.A.).

In fact under the United States Arbitration Act (9 U. S. Code, Section 3) the Court must be "satisfied" that there is an agreement for arbitration and that the issue involved in the pending suit is referable to arbitration under the agreement.

Kulukundis Shipping Co. v. Amtorg Trading Corp.,
126 F. (2d) 978, 981 (2 C.C.A.).

The Court below was not satisfied that there was such an agreement (R. 91). The subject of the contract between the parties is a sale of oil. Rules defining contract terms, conditions of shipment, price, quality, etc. are pertinent to such a sales contract. But a rule providing for arbitration is not pertinent to the performance of any

contract and has no bearing on the respective rights or obligations of the parties. An arbitration clause merely provides a means of settling disputes and the parties must contract explicitly for such means before either party will be deprived of the usual remedies afforded by the Courts. When the parties contract that "This contract is subject to the published Rules," etc., it must be deemed that the rules referred to are those pertinent to the performance of a contract for a sale of coconut oil, and not that the parties thereby intended, without even a mention of arbitration, to relinquish their right to appeal to the Courts to protect or enforce their respective rights or obligations.

The alleged incorporating clause does not refer to *all* the rules of the Institute. There are 152 such rules (R. 41-69). A cursory glance at the rules will reveal that a great many of them could have no conceivable relation to the contract here involved. Yet, under appellant's contention, all of these 152 rules are an integral part of the contract.

There are not many authorities discussing the question presented. Apparently persons desiring arbitration in event of a dispute have been careful to provide clearly therefor in the contract. However, the authorities on the point support the position now taken by appellee Southern Cotton Oil Company.

In *Thomas & Co. v. Portsea S.S. Co.*, 12 Aspinall M. C. (N.S.) 23, (1912) A. C. 1, a decision by the English House of Lords, one of the parties to a bill of lading contended that arbitration of a dispute was required by reason of the following clauses in the bill of lading:

"* * * to William Malcolm Mackay or his assigns, he or they paying freight for the said goods with other conditions as per charter-party", and

"Deck load at shipper's risk, and *all* other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause."

The charter-party referred to in the foregoing clauses provided for arbitration of all disputes. However, the Court held that the arbitration clause was not thereby incorporated in the bill of lading. The Lord Chancellor stated:

"The arbitration clause is not one that concerns shipments, or carriage, or delivery, or the terms upon which delivery is to be made or taken; it only governs the way of settling disputes between the parties to the charter-party, and disputes arising out of the conditions of the charter-party, not disputes arising out of the bill of lading. In my opinion the Court of Appeal relied rightly upon the decision in Hamilton v. Mackie (5 Times L. Rep. 677), and, if it is desired to put upon the holders of a bill of lading an obligation to arbitrate because that obligation is stated in the charter-party, it must be done explicitly."

The foregoing decision by the highest English Court is entitled to particular weight by the Federal Courts in the interpretation of a commercial contract.

The Eliza Lines, 199 U. S. 119, 128, 50 L. Ed. 115, 119.

The same question was presented to the Court in *In re General Silk Importing Co.,* 189 N. Y. S. 391. The Court denied a petition for arbitration on the ground that the

contract did not provide for arbitration. A contract for the sale of silk provided that "Sales are governed by raw silk rules adopted by the Silk Association of America". The rules referred to provided that "All differences arising between the buyer and seller must be submitted to the arbitration committee of the Silk Association of America". The Court said, page 395:

> "The only point here is whether this contract shows with sufficient definiteness that the minds of the parties met on this point, and that they intended to adopt the rules of the Silk Association of America, not merely to insure performance of the contract in accordance with those rules, but that, in the event of a controversy, it should be arbitrated in accordance therewith. The parties could have provided for such arbitration, without setting forth all or any of the rules of the Silk Association of America, if they had merely added, to the provision incorporated in the contract to the effect that the sales are to be governed by those rules, a provision that, in the event of a controversy between the parties, it should be arbitrated as provided by the rules, or if the contract had provided in any manner by appropriate phraseology that the reference to the rules was intended to include those providing for arbitration. That, however, was not done; and since it does not appear that the respondent is a member of the association and it fairly appears that appellant is, the contract should not be construed as constituting an agreement between the parties to relinquish all right to appeal to the courts for redress under the contract, and to submit to the determination by arbitration under said rules of any claim either of them might have for a breach of the contract."

The same conclusion was reached on a second appeal (194 N. Y. S. 15), although it then appeared that both parties to the contract were members of the Silk Association of America. The decision was affirmed by the Court of Appeals in 234 N. Y. 513, 138 N. E. 427.

In the instant case it appears from the affidavit of John J. Whelan that appellee Southern Cotton Oil Company is not a member of the National Institute of Oilseed Products, so that the rules of that Institute can be made binding on appellee only by explicit provision therefor in the contract of sale.

In *Bachmann Emmerick & Co. v. S. A. Wenger & Co.,* 197 N. Y. S. 879, the Court considered a contract containing the same provision as that involved in *In re General Silk Importing Co.,* supra, and likewise reached the conclusion that such contract did not incorporate the rule of the Silk Association providing for arbitration.

Appellant cites only one case discussing the incorporation in a contract of an arbitration clause by reference to another document. The other cases cited by appellant are merely examples of incorporation by very specific reference to a particular document or part thereof.

The one case cited by appellant referring to incorporation of an arbitration clause is *Hines v. Ziegfeld,* 226 N. Y. S. 562. That case is clearly distinguishable from the instant case. In that case a contract of employment incorporated all of the provisions of a standard *form of contract* for that type of employment. There was no attempt to incorporate by reference general rules which might or might not be applicable to the specific contract.

The parties simply agreed that their contract was made on a specific form. The agreement signed by the parties was intentionally not the complete contract, but a mere memorandum to be incorporated into a standard form of contract. Further, the parties there specifically agreed *after* the dispute arose, to arbitrate their dispute. It was, therefore, immaterial whether the original contract provided for arbitration or not.

Marine Transit Corporation v. Dreyfus, 284 U. S. 263, 76 L. Ed. 282, cited by appellant, does not discuss or even mention the question now presented. The decision is, of course, no authority on a point neither raised nor discussed. It should be noted that the booking agreement there involved was, as in *Hines v. Ziegfeld,* supra, a mere memorandum making a contract on a standard form of contract, not an attempt to incorporate by reference general rules which might or might not be applicable to the specific contract.

The California cases cited by appellant (Brief, pp. 9-11) do not involve incorporation by reference of an arbitration clause, but are merely examples of incorporation by very specific reference to such specific matters as prices, list of subscribers, or to a particular form of lease. They do demonstrate how simply and specifically appellant could have referred to and incorporated the arbitration provision of the Institute rules in the present contract.

It is particularly significant that the rules alleged by appellant to be a part of the contract herein provide for uniform contracts (Rule 78, R. 56). The uniform contracts are set forth at the end of the rules (R. 71-79). Each of these uniform contracts provides as follows:

> "Clause paramount: This contract is subject to published rules of the National Institute of Oilseed Products adopted and now in force, which are hereby made a part hereof, except insofar as such rules may be specifically abrogated herein, and any dispute arising under this contract shall be settled by a Board of Arbitration selected by the San Francisco Chamber of Commerce and to be judged according to the rules of the National Institute of Oilseed Products, and the findings of said Board will be final and binding upon all the signatories hereto."

The framers of the rules thus recognized that the simple provision now relied upon by appellant is by itself insufficient to incorporate an arbitration clause into a contract and specifically provided for arbitration by additional specific language in the uniform contract.

The contract of sale here involved was drawn on the appellant's printed form which *omits* from the "Clause Paramount" the specific provision for arbitration quoted above. Therefore, as stated by the District Court (R. 91):

> "The omission of this clause in the contract indicates that the parties intended these rules to apply to performance rather than to enforcement."

Since the contract does not provide for arbitration, the District Court properly denied appellant's motion for a stay of proceedings pending arbitration.

II. APPELLANT IS IN DEFAULT IN PROCEEDING WITH ARBITRATION.

The United States Arbitration Act (9 U. S. Code, Sec. 3) and the California Arbitration Act (Code of Civil Procedure, Sec. 1284) both permit a stay of a pending action only in event that "the applicant for the stay is not in default in proceeding with such arbitration".

The question of whether either party is in default in proceeding with arbitration is largely a discretionary one for the District Court.

In *La Nacional Platanera v. North American F. & S. S. Corp.*, 84 F. (2d) 881, 883 (5 C.C.A.), the Court said:

> "Under a reasonable construction of that section of the Act the District Court was vested with discretion to deny the prayer for the reference of the dispute to arbitrators as well as to refuse to stay the suit if he considered plaintiff was in default in proceeding with the arbitration."

The terms of an agreement for arbitration determine to a large extent whether either party is in default in proceeding with arbitration. Institute Rule 64, which appellant contends is incorporated into the contract of sale herein involved, provides that any dispute which cannot be settled amicably between the parties shall *immediately* be *submitted* to arbitration (R. 54). Institute Rule 68 sets forth the form of request for arbitration (R. 55).

The loss for which recovery is sought in this action occurred in July, 1941 (R. 86). Appellee Southern Cotton Oil Company presented claim against both appellant and appellee Southern Pacific Company on August 19, 1941 (Complaint, paragraph X, R. 5, not denied by appellant).

The claim was again presented to appellant on January 19, 1942 (R. 86). Appellant declined to pay the claim long prior to the filing of the complaint herein (R. 29-30, 35). The complaint was filed on November 19, 1942 (R. 7).

Appellant has never requested arbitration on the form provided by Institute Rule 68 and first made a demand on appellee Southern Cotton Oil Company for submission of the controversy to arbitration on January 29, 1943, more than two months after the complaint herein was served on appellant and more than eighteen months after the loss had occurred (R. 85-86).

Appellant makes some contention that it "proposed" arbitration prior to the filing of the complaint (Brief, pp. 21, 23). However, letters attached to the affidavit of Adolph Schumann, appellant's president, show merely that Mr. Schumann thought that an arbitration "might be the sensible thing", or he said "something about arbitration" (R. 29-36). Mr. Schumann also said in his final letter: "It is a matter entirely between the Southern Cotton Oil Company and the Railroad, if we are drawn into it well and good." Appellant was, therefore, apparently quite willing to take its chance in litigation and was not insistent on arbitration.

The affidavit of John J. Whelan shows that Mr. Schumann never made any oral demand or request to him for arbitration in discussing appellee's claim for damages (R. 87-88). Appellant's Mr. Schumann apparently preferred arbitration to litigation, but tried to play fast and loose with appellee Southern Cotton Oil Company, hoping that there would be neither arbitration nor litigation.

The District Court, in a proper exercise of discretion, concluded that appellant was in default in failing to proceed *immediately* with arbitration, as required by Institute Rule 64, which appellant contends is applicable (R. 91-92).

The cases cited by appellant are not in point (Brief, pp. 21-24). In *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.,* 70 F. (2d) 297, and in *Kulukundis Shipping Co. v. Amtorg Trading Corp.,* 126 F. (2d) 978, 980, the arbitration agreements merely provided that disputes should be arbitrated. There was no time fixed for arbitration and, hence, the party seeking redress was required to take the initiative. However, the arbitration clause which appellant here contends is a part of the contract requires that any dispute "shall *immediately* be *submitted* to arbitration before a committee selected by the San Francisco Chamber of Commerce". An equal burden is thereby placed on both parties to *submit* the dispute immediately.

If, therefore, Institute Rule 64 applies to the contract here involved, it is clear that appellant is in default in proceeding with arbitration. A demand for arbitration made on January 29, 1943, for arbitration of a controversy arising in August, 1941, is certainly not an immediate submission to arbitration. A party may waive the right to arbitration either before or after suit is filed on the dispute.

William S. Gray & Co. v. Western Borax Co., 99 F. (2d) 239, 240 (9 C.C.A.).

III. THE ISSUES INVOLVED IN THIS ACTION ARE NOT REFERABLE TO ARBITRATION UNDER THE ALLEGED ARBITRATION CLAUSE.

Before granting a stay of proceedings in an action pending arbitration, the Court must first determine not only whether the contract provides for arbitration at all, but must also be "satisfied" that the issues involved in the pending suit are of such a nature as to be referable to arbitration under the terms of the alleged arbitration clause.

Section 3, *United States Arbitration Act,* 9 U. S. Code;

B. Fernandez & Hnos v. Rickert Rice Mills, Inc., 119 F. (2d) 809, 814 (1 C.C.A.).

The District Court held that the controversy involved in this action does not in any event come within the terms of the arbitration clause which appellant contends is incorporated into the contract between the parties (R. 92-93).

The clause referred to provides (Rule 64, R. 54):

> "Any dispute arising under contracts which cannot be settled amicably between interested parties shall immediately be submitted to arbitration before a committee selected by the San Francisco Chamber of Commerce under the Rules of the National Institute of Oilseed Products."

The District Court held that the controversy between the parties was not one "arising under contracts" because (R. 92):

> "The solution of the dispute does not involve an interpretation of the contract of sale. Although the contract of sale created the relationship between the

> seller and plaintiff, just as the contract of carriage created the relationship between the shipper (carrier) and plaintiff, the action is based on negligence, not on breach of contract. The question to be determined is whether there is negligence of the seller or of the shipper (carrier) or of both which caused the loss. Assuming for the moment that it was the negligence of the seller, no term of the contract, no provision for the placement of the risk of loss, would be a defense, so that the dispute is not under the contract but outside of it."

It is true, as appellant states (Brief, p. 16), that the contract for the sale of the oil created the relationship, or more correctly *a* relationship, between appellant and appellee Southern Cotton Oil Company—that of seller and buyer. It is equally true, as stated by the District Court, that appellant cannot and does not rely upon the contract to exonerate it from liability against the allegation of negligence. The duties which appellant concedes it had to perform are not duties specifically set forth in the contract. They are duties implied by law from the relationship of the parties. Since appellant concedes the onus of the duties, there is no "dispute arising under the contract", as to the rights or obligations of the parties. The issue is simply whether appellant was guilty of negligence which caused or contributed to the loss of the shipment of oil. The arbitration rule, relied on by appellant, does not purport to include that question.

In *Young v. Crescent Development Co.,* 240 N. Y. 244, 148 N. E. 510, a building contract provided that: "All questions that may arise under this contract and in per-

formance of the work thereunder shall be submitted to arbitration at the choice of either of the parties hereto." The contractor sought to submit to arbitration claims for damages because the owner had delayed the contractor in performing the contract. The Court held that the claim for damages by reason of delay caused by the owner was not embraced in the arbitration clause. The Court said:

> "According to respondents' theory the acts done by appellant were not done under and in performance of the contract, but in violation of it and in repudiation of its provisions. There is involved no interpretation of its meaning, but a willful refusal to be bound by and, as it seems to me, this clause was intended to cover controversies which do not deny but seek an interpretation of and submission to its provisions; an attitude which seeks action under the contract and not one outside of and in denial of it."

Certainly a claim for damages based on negligence is, even more than a claim based on delay, outside of the contract.

In *Wilson v. Curlett,* 140 Md. 147, 117 Atl. 6, 9, a seller brought an action against the buyer for the price of a lot of canned tomatoes delivered pursuant to a contract of sale. The buyer denied liability on the ground that the seller had failed to deliver the whole lot of tomatoes called for by the contract. The buyer also contended that the action should be abated because the contract provided that "all disputes under this contract shall be arbitrated in the usual manner". The Court held that an action by the seller for the price was not within the scope of the arbitration clause, stating:

> "The contract in question contains a number of provisions under which disputes might have arisen, and the clause in question was doubtless intended to cover such disputes. There is nothing in the agreement to indicate that the parties intended to submit to arbitrators their ultimate right to the enforcement of the agreement, and even if it be assumed that an express stipulation to that effect would be sustained by the courts, we cannot hold that such right is covered by the clause referred to so as to make arbitration a condition precedent to a suit for the enforcement of the contract."

The above cases show, we believe, that an action for the value of the oil based on appellant's negligence is, as held by the District Court, outside the scope of the alleged arbitration clause.

The determination of whether a particular issue or dispute is within the scope of a particular arbitration agreement depends to a great extent upon the language of the agreement and the nature of the dispute under consideration. We, therefore, see no reason to discuss the cases cited by appellant as to the scope of various other arbitration agreements (Brief, pp. 16-19). None of these cases appear to bear any persuasive analogy to the questions now presented.

The controversy here involved is outside the scope of the contract for an additional reason. Institute Rule 33 provides (R. 47):

> "Rule 33.—Loss of Shipment. Should shipment or any portion thereof, be lost, contract to be void to the extent of such quantity."

If the arbitration clause contained in the Institute rules is incorporated in the contract as appellant contends, then Rule 33 must likewise be so incorporated. Admittedly the shipment here involved was lost. If the contract then became void, pursuant to Rule 33, there is nothing left to arbitrate. Obviously, appellant must return the consideration paid under a void contract.

6 *Cal. Jur.,* page 28.

Hence, no arbitrable controversy is presented. Thus in *B. Fernandez & Hnos v. Rickert Rice Mills,* 119 F. (2d) 809 (1 C.C.A.), a contract for the sale of rice provided for arbitration as follows:

> "Arbitration—Both buyer and seller hereby agree to submit all questions of quality, complaints, disputes and/or controversies that may arise out of or in connection with this contract, in the following manner:"

The contract also provided that a certain certificate should be conclusive as to quality. The certificate when issued stated that the rice was inferior in quality to that called for by the contract. The buyer contended that it was entitled to reject such inferior shipment. The seller contended that the parties had to arbitrate the damage due to the inferior quality of the goods. The Court held, despite the broad language of the arbitration clause, that the buyer was entitled to reject the shipment and was not required to arbitrate the amount of damages suffered by reason of the inferior quality of the rice, since the certificate was final on the question of quality.

The Court said, page 815:

> "A party is never required to submit to arbitration any question which he has not agreed so to submit,

and contracts providing for arbitration will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to submit."

Likewise, here, where Rule 33, if incorporated in the contract as appellant contends, provides that the contract is to be void should the shipment be lost, the rule is conclusive. Appellee does not have to submit to arbitration its right to recover the amount paid under the avoided contract, since that right inevitably follows from Rule 33.

Furthermore, as pointed out by the Court below, arbitration cannot determine the issues involved in the pending action (R. 92). An arbitration clause obviously does not embrace in its scope an issue which cannot be disposed of by arbitration. Section 3 of the United States Arbitration Act (9 U. S. Code, Section 3) clearly gives discretion to a Court in determining whether the issue involved in an action is referable to arbitration. The proper exercise of such discretion does not require the granting of a stay of the trial of the action to permit the performance of an idle act.

Appellee Southern Pacific Company is not a party to the contract in question and cannot be compelled to arbitrate the issues involved in this action. If the appellant were to receive an award from arbitrators, appellee Southern Cotton Oil Company could still proceed against appellee Southern Pacific Company who could nevertheless implead appellant in the pending action and show that the damage was due to the negligence of appellant. If appellee Southern Cotton Oil Company received an award, the appellee or appellant could still proceed against

appellee Southern Pacific Company and show that the loss was due to the latter's negligence. In either event, the Court might also find that the loss was due to the neglect of both defendants. The award of the arbitrators might and could, therefore, be rendered a nullity.

Marine Transit Corp. v. Dreyfus, 284 U. S. 263, 275, 76 L. Ed. 282, 289, does not, as asserted by appellant, show that it is proper to refer to arbitration a portion of the dispute between the parties. On the contrary, the Court pointed out that there was no reason to split the action as to the claim *in personam* and as to the claim *in rem* because the Marine Transit Corporation was bound to the arbitration agreement both as respondent *in personam* and as claimant of the vessel *in rem.* The Court pointed out that the action had been previously dismissed as to a third person.

We, therefore, respectfully submit that the District Court exercised proper judicial discretion in concluding that the issues involved in this action do not come within the scope or terms of the alleged arbitration clause.

IV. THE ARBITRATION PROVIDED FOR BY THE RULES OF THE NATIONAL INSTITUTE OF OILSEED PRODUCTS IS COMMON-LAW ARBITRATION AND HENCE AN AGREEMENT TO ARBITRATE THEREUNDER IS REVOCABLE AT ANY TIME PRIOR TO AN AWARD.

However, even if it be determined that the contract does provide for arbitration, that appellant has not waived its alleged right to arbitration and that the controversy involved in the present action is within the scope of the alleged arbitration clause, appellant is still not entitled to

a stay of this action. For, appellee Southern Cotton Oil Company has revoked and was entitled to revoke the arbitration clause, if there be one, in the contract.

Two methods of arbitration are recognized in California: Common-law arbitration and statutory arbitration.

Christenson v. Cudahy Packing Co., 198 Cal. 685, 692;

Dore v. Southern Pacific Co., 163 Cal. 182, 188;

Riccomini v. Pierucci, 54 Cal. App. 606, 608;

Water District v. Spring Valley Water Co., 67 Cal. App. 533, 540.

The Federal Courts likewise recognize the two methods of arbitration.

Lehigh Structural Steel Co. v. Rust Engineering Co., 59 F. (2d) 1038, 1039.

Sturges on Commercial Arbitration & Awards (1930), page 2, states:

> "The view is almost uniformly held that parties may arbitrate under common law rules notwithstanding the existence of an arbitration statute. The arbitration statutes of the different jurisdictions are regarded as merely cumulative. Parties may choose either method. They may manifest their purpose to arbitrate under the arbitration statute of a given jurisdiction by executing a written arbitration agreement according to the requirements of the statute. If they do not so manifest their purpose common-law rules of arbitration generally control."

The difference between the two methods of arbitration which is important in this case is that an agreement for or submission to common-law arbitration is revocable by

either party prior to an award, whereas an agreement for statutory arbitration may, by virtue of a statutory provision, be irrevocable.

Christenson v. Cudahy Packing Co., 198 Cal. 685, 692;

Key v. Norrod, 124 Tenn. 146, 136 S. W. 991, 992;

Hughes v. National Fuel Co., 121 W. Va. 392, 3 S. E. (2d) 621, 624.

The terms of the agreement for arbitration ordinarily determine whether the parties intended the arbitration to be statutory or common law.

Institute Rules 64 to 76, which appellant contends is part of the contract of sale, definitely provide for a common-law arbitration (R. 54-56). The rules refer to no statutory procedure at all, so that the only statutory procedure which could conceivably have any application is The United States Arbitration Act (9 U. S. C. A., Secs. 1-15), or the California Arbitration Law (*Code of Civil Procedure,* Secs. 1280-1293). We shall refer to these acts in showing that the rules which appellant seeks to invoke provide for a common-law arbitration.

We do not contend that an arbitration clause must provide specifically for arbitration pursuant to a particular statute or adopt specifically the procedure of a particular arbitration statute in order to qualify as statutory arbitration. An arbitration clause in a contract, executed as required by the particular statute invoked, may, perhaps, qualify under that statute without any specific reference to the statute at all. However, we do say that an arbitration clause which does not refer to any arbitration statute at all and which directly or necessarily negatives the

intended application of an arbitration statute provides only for common-law arbitration. In this respect, it must be noted that the Institute rules for arbitration, on which appellant now relies, do not provide merely for arbitration in general terms but set up a comprehensive procedure intended to be complete and final in itself.

The Institute rules provide for a common-law arbitration instead of a statutory arbitration for the following reasons:

1. The rules for arbitration make no mention whatever of any statutory procedure or of any statute governing arbitration. On the contrary, and even more significant, Rule 64 expressly provides that the arbitration is to be "under the Rules of the National Institute of Oilseed Products". The application of any statutory procedure is thus expressly negatived.

In *Carey v. Herrick,* 146 Wash. 283, 263 Pac. 190, 193, the Court said:

> "It should be noticed at the outset that there is nothing in the original agreement from which it can be inferred that the arbitration was to be statutory. It is totally silent upon the question. Assuming that the matter is one capable of being submitted to statutory arbitration, the parties had the choice of either method, statutory or common law. The absence of any words, indicating a statutory one would lend support to the belief that it was to be at common law. But perhaps a better way determining the intention of the parties is to see whether the instrument itself provided for action according to the statute or contrary thereto."

Likewise in *Water Dist. v. Spring Valley Water Co.*, 67 Cal. App. 533, 540, the Court said:

> "It is evident from the terms of said agreement that there was no intention of the parties to bring themselves within an arbitration provided for by the code (sec. 1283 et seq., Code Civ. Proc.). In fact no such contention is made by appellants. Their agreement was in the nature of a common-law submission to arbitration, a voluntary withdrawal of the case from the jurisdiction, by which the court lost all control over the case and had no authority to enter judgment, providing the settlement was reached by said arbitrators, which, as we have already seen, was accomplished."

2. Rule 68 (R. 55) provides that each party to the arbitration "hereby agrees and promises to abide by the award and findings of the arbitrators, and in the event of an adverse decision, to make prompt settlement and likewise pay the fees and costs as provided for in the rules of said Institute". Rule 76 (R. 56) contains a similar provision of finality to the arbitrators' award.

The rules contain no provision whatever for recourse or appeal to the Courts after an award. On the contrary, Rules 68 and 76 not merely provide that the award is final, but provide that prompt payment of the award be made and impose a penalty for failure to make such payment.

Both The United States Arbitration Act (9 U. S. C. A., Secs. 10, 11 and 12), and the California Arbitration Law (*Code of Civil Procedure,* Secs. 1288, 1289, 1290, 1291)

provide for an application to the Court to vacate, modify or correct an award.

The Institute rules not merely do not provide for such application but expressly negative the right to make any such application. The right to make such application is one of the essential elements of statutory arbitration.

In *Carey v. Herrick,* 146 Wash. 283, 263 Pac. 190, 193, the Court said:

> "* * * We have heretofore set out the arbitration agreement providing that the findings of the arbitrator shall be 'final, conclusive and binding upon the parties'. If the parties had intended that this was to be statutory they knew that it could not be final and conclusive, but that it could be vacated upon numerous grounds set forth in the statute as well as modified and corrected for many more. The parties could not by stipulation deprive the court of its power to set aside a statutory award for any or all of the grounds provided in the statute.
>
> "* * * We need go no further to decide this question than to examine the agreement itself. If it fails to provide for statutory arbitration and contains provisions contrary to the statute we shall not legislate the parties under it. What they have failed to do the court cannot do for them."

In *Lehigh Structural Steel Co. v. Rust Engineering Co.,* 59 F. (2d) 1038, 1039, the Court of Appeals for the District of Columbia said:

> "This plaintiff seeks a summary statutory process in derogation of common-law rights, procedure, and trial by jury, but such a plaintiff must bring himself

clearly within his statute before he is entitled to its remedy.

* * * * * * *

"And when these parties were making their agreement for arbitration, it was easy enough to stipulate themselves within the statute by an agreement for judgment on motion, if they so intended, but they failed to do so."

In *Christenson v. Cudahy Packing Co.,* 198 Cal. 685, 692, the Court said:

"But even if this procedure had been followed, the arbitration not having been made in accordance with the provisions of the Code, and being simply a common-law arbitration, the appellant could have revoked the submission thereof and refused further to participate in the proceeding."

In *Park Construction Co. v. Independent School Dist.,* 209 Minn. 182, 296 N. W. 475, 476, the Court said:

"* * * The agreement for arbitration and the proceedings in pursuance to it failed in so many respects to meet the requirements for statutory arbitration under 2 Mason's Minn. St. 1927, Secs. 9513 et seq., that it is impossible to suppose an intention to proceed thereunder."

To the same effect are:

Key v. Norrod, 124 Tenn. 146, 136 S. W. 991, 992;

Hughes v. National Fuel Co., 121 W. Va. 392, 3 S. E. (2d) 621, 624;

Andrews v. Jordan, 205 N. C. 618, 172 S. E. 319, 322;

Fidelity & Deposit Co. v. Waltz, 253 N. Y. S. 583.

3. Institute Rule 71 (R. 55) provides that the arbitration shall be submitted on written statement of facts, together with written arguments and that no oral evidence nor personal appearance of the parties shall be permitted *unless requested by the arbitrators.*

The California Arbitration Law (*Code of Civil Procedure,* Secs. 1286, 1288 (c)) and the United States Arbitration Act (9 U. S. C. A., Secs. 7, 10(c)) both recognize the *right* to a hearing before the arbitrators and the presentation of oral testimony. The Institute rules thus distinctly deny the application of the statutory rules to arbitration under the Institute rules and, in so doing, deprive the parties of a particularly valuable right recognized by the statutes. The authorities cited under point 2 above show, therefore, that the Institute rules provide only for a common-law arbitration.

4. Institute Rule 74 (R. 56) provides that the award shall be in writing and signed by the arbitrators. The California Arbitration Law (*Code of Civil Procedure,* Sec. 1287) requires that an award must be acknowledged in order to receive confirmation by the Court. An award which is not acknowledged is a mere common-law award.

Hines v. Ziegfeld, 226 N. Y. S. 562.

It thus appears that the Institute rules not only do not provide for statutory arbitration but provide for a procedure which rejects or conflicts with the statutory procedure in important respects. The Institute rules, therefore, obviously provide only for a common-law arbitration.

It is clear that the Court will not enforce specifically or grant a stay of an action upon a contract providing for arbitration which is not governed by statute.

Tatsuuma Kisen Kabushiki Kaisha v. Prescott, 4 F. (2d) 670 (9 C.C.A.).

Further, either party to a contract providing for a common-law arbitration may revoke such provision at any time prior to award. Appellee Southern Cotton Oil Company has revoked such provision, if there be one, by bringing this action.

La Nacional Platanera v. North American F. & S. S. Corp., 84 F. (2d) 881, 882 (5 C.C.A.);

William S. Gray & Co. v. Western Borax Co., 99 F. (2d) 239 (9 C.C.A.);

The Belize, 25 F. Supp. 663, 664 (S.D.N.Y.).

There is, therefore, no arbitration provision remaining in the contract to furnish the basis for appellant's motion to stay this action.

V. APPELLANT'S MOTION FOR A STAY OF PROCEEDINGS IS BASED ON THE CALIFORNIA ARBITRATION LAWS WHICH WILL NOT BE ENFORCED BY THE FEDERAL COURTS.

Appellant states in its brief, pages 11-12, that both The United States Arbitration Act (9 U. S. C. A., Sec. 3) and the State of California Arbitration Law (*Code of Civil Procedure,* Sec. 1284) permit the Court to order a stay of proceedings pending arbitration. Appellant is in error. The Federal Courts will not enforce a state arbitration statute.

The Federal Courts will not specifically enforce an arbitration agreement pursuant to a state arbitration

statute because such a statute is purely remedial and does not establish a substantive right.

California Prune & Apricot Growers' Ass'n v. Catz-American Co., 60 F. (2d) 788 (9 C.C.A.).

The contract here provides that it is to be governed by the laws of California (R. 22). Hence the District Court could not specifically enforce the alleged arbitration clause.

Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 70 F. (2d) 297, 298 (2 C.C.A.).

The above decision likewise assumes that the Federal Courts will not even grant a stay of proceedings pursuant to a state arbitration statute, but only pursuant to the United States Arbitration Act. The California Arbitration Law, therefore, does not provide the basis for any remedy to appellant in the case at bar.

Appellant, however, has based its motion for a stay of proceedings herein wholly on Section 1284 of the California Code of Civil Procedure, and not upon Section 3 of the United States Arbitration Act (R. 23-25). Appellant cannot now shift its grounds of motion to rely on the latter act. Grounds for a motion not stated in the motion are waived.

Nevada Co. v. Farnsworth, 89 Fed. 164, 167 (C.C. Utah);

Roloff v. Perdue, 31 F. Supp. 739, 743 (N.D. Ia.).

It will be noted that in *Shanferoke Coal & Supply Co. v. Westchester Service Corp.,* supra, on which appellant leans so heavily, the defendant moved to stay the action pursuant to Section 3 of the United States Arbitration Act, not pursuant to a state statute.

We submit that appellant is bound by the grounds stated in its motion for a stay of the action.

CONCLUSION.

The authorities cited and discussed above hold that arbitration agreements are to be strictly construed. An agreement to arbitrate should not be read into a contract by implication and the scope of an arbitration agreement should not be extended by implication.

We, respectfully, submit that the points discussed in the foregoing brief show that the District Court was required to deny the motion for a stay of proceedings pending arbitration. The record and applicable law show that appellant is not entitled to arbitrate the issues presented in the action, but, in addition, the three-cornered controversy presented in this action is of such a nature that arbitration could not finally dispose of it, nor aid in its ultimate solution. The District Court properly exercised its judicial discretion in denying appellant's motion.

Appellee Southern Cotton Oil Company respectfully submits that the order appealed from should be affirmed.

Dated, San Francisco,
August 27, 1943.

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